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September 13, 2004

Via Electronic Filing

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

**Re: Notice of Written Ex Parte Presentation
In the Matter of IP-Enabled Services, WC Docket No. 04-36**

Dear Ms. Dortch:

On behalf of our client, Nuvio Corporation ("Nuvio"), we are hereby submitting the attached written ex parte presentation to Commissioner Kevin J. Martin for inclusion in the record of the above-referenced proceeding.

Any questions regarding this matter may be directed to the undersigned.

Respectfully submitted,



Philip L. Malet
Carlos M. Nalda

Counsel to Nuvio Corporation

cc: Commissioner Kevin J. Martin

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Commissioner Kevin J. Martin
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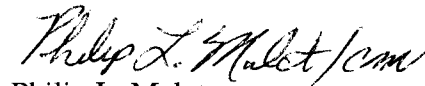
Dear Commissioner Martin:

On behalf of our client, Nuvio Corporation ("Nuvio"), we would like to thank you for meeting with us to discuss the regulatory framework for IP-Enabled Services, such as Voice Over Internet Protocol ("VOIP"). Nuvio hereby presents its rationale for requiring broadband Internet access providers to afford non-discriminatory access to both affiliated and nonaffiliated VOIP providers.

As explained more fully in the attached "White Paper on Title I Jurisdiction over Broadband Access Providers," broadband Internet access providers that also offer VOIP service have economic incentives to discriminate against nonaffiliated VOIP providers. If left unchecked, such discrimination would seriously endanger the vibrant competition that currently exists in the market for VOIP services and ultimately harm consumers. Therefore, Nuvio urges the Commission to exercise its Title I authority over information services to preserve competition in the VOIP market by prohibiting such discrimination by broadband Internet access providers.

Any questions regarding this matter may be directed to the undersigned.

Respectfully submitted,


Philip L. Malet
Carlos M. Nalda

Counsel to Nuvio Corporation

White Paper on Title I Jurisdiction over Broadband Access Providers

Jason P. Talley -- CEO, Nuvio Corporation

Nuvio Corporation (“Nuvio”) hereby presents a regulatory framework for requiring broadband Internet access providers to afford non-discriminatory access to unaffiliated Voice Over Internet Protocol (“VOIP”) providers. As explained more fully below, broadband Internet access providers that also offer VOIP services have economic incentives to discriminate against unaffiliated VOIP providers. If left unchecked, such discrimination would seriously endanger the vibrant competition that currently exists in the market for VOIP services and ultimately harm consumers. Therefore, Nuvio urges the Commission to exercise its Title I authority over information services to preserve competition in the VOIP market by prohibiting such discrimination by broadband Internet access providers.

1. Broadband Internet Access Providers That Also Offer VOIP Services Have Economic Incentives to Discriminate in Favor of Affiliated Over Unaffiliated VOIP Providers

Broadband Internet access and VOIP services are vertically related markets in the sense that a broadband connection is an essential input to the provision of VOIP services. VOIP services depend critically on the quality of the underlying broadband connection linking the customer to the Internet. Slow connections or dropped packets have a major impact on the sound and service quality experienced by the VOIP customer and thus the consumer’s acceptance of the service and choice of VOIP provider. This means that broadband Internet access providers, through their control of the broadband connection, have the ability to control the quality of service that a VOIP customer experiences from any affiliated or unaffiliated VOIP provider. This raises the possibility that a broadband provider that also offers VOIP services may discriminate against unaffiliated VOIP providers in order to increase its overall profits and retain market share.

Vertically integrated broadband/VOIP providers have every incentive to discriminate against unaffiliated VOIP providers. By blocking or degrading access to unaffiliated VOIP services, the vertically integrated firm can create a quality difference in favor of its affiliated VOIP services. In turn, such quality differences induce broadband subscribers to choose the affiliated VOIP services over unaffiliated service providers and thus increase the VOIP revenues and market share of the integrated firm (especially if there are economies of scale associated with providing VOIP services). While some of the vertically integrated firm’s broadband subscribers might switch to other broadband providers in order to obtain better quality VOIP connections from unaffiliated VOIP providers, as long as their increase in VOIP revenues exceed

any drop in broadband subscription revenues, the vertically integrated firm will find it profitable to continue to discriminate against unaffiliated providers.¹

Such discrimination is likely to occur for the following reasons. First, the increase in VOIP revenues from discrimination is likely to be great because VOIP is expected to be the new “killer app” among consumers, with many experts projecting explosive growth.² Thus, the ability of the vertically integrated firm to offer a superior quality VOIP service through discrimination is likely to lead to a substantial increase in its VOIP subscribers, market share and revenues. Second, any drop in broadband subscription revenues resulting from discrimination is likely to be small because (i) the broadband market is highly concentrated and residential consumers are limited in their choice of broadband providers; and (ii) there are high costs associated with switching broadband providers (e.g., early termination penalties, service initiation fees, the need for new equipment, and the loss of discounts for obtaining bundled services from the broadband provider). Of course, this assumes that subscribers even know that their broadband providers are engaged in such discriminatory practices. They may simply believe that the affiliated VOIP provider has a superior VOIP service. Thus, there is every reason to fear that vertically integrated broadband/VOIP providers will discriminate against unaffiliated VOIP providers in the provision of broadband access.

2. If Left Unchecked, Such Discrimination Will Endanger Vibrant Competition in the Market for VOIP Services

Currently, the market for VOIP services is characterized by vibrant competition among firms, many of which are not vertically integrated in the provision of broadband Internet access services. Instead, many VOIP providers (including Nuvio) offer service over the broadband connectivity purchased separately by the customer from a nonaffiliated broadband access

¹ The analysis here is the essentially the same as the analysis conducted in the course of AOL/Time Warner merger. See Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 BERKELEY TECH. L.J. 631, 664 (2001) (“AOL Time Warner will engage in content discrimination if the gain from additional portal, content and advertising sales offsets the reduction in broadband revenues resulting from lost broadband subscribers.”); Daniel L. Rubinfeld & Hal J. Singer, *Vertical Foreclosure in Broadband Access?*, 49 J. IND. ECON. 299, 310 (2001) (“a vertically integrated cable company will find it profitable to engage in content discrimination if the gain from additional portal, content and advertising sales offsets the reduction in broadband access revenues resulting from lost broadband subscribers.”). It is noteworthy that both the FTC and the FCC saw fit to impose conditions on the merger that constrained AOL Time Warner’s ability to engage in content discrimination. See <http://www.ftc.gov/opa/2000/12/aol.htm> (last visited Aug. 30, 2004) (prohibiting AOL Time Warner from discriminating on the basis of affiliation in the transmission of content across its cable system); *Time Warner Inc.*, 16 FCC Rcd. 6547, 6600 ¶ 126 (2001) (imposing, *inter alia*, nondiscrimination conditions on technical performance (e.g. quality of service and caching)).

² See, e.g., *Broadband Telephony Taking Off*, Network World Fusion (Sept. 1, 2003).

provider. Thus, VOIP customers and VOIP service providers must rely on the intermediate broadband Internet access provider, which is being compensated by customers through broadband access service charges, to provide the unfettered broadband connection needed for VOIP service.

However, the major broadband Internet access providers – both the large cable companies and the incumbent telephone companies – are launching their own VOIP services.³ If these vertically integrated firms are free to discriminate against unaffiliated VOIP providers, they will almost certainly garner the major share of the VOIP market, and in doing so drive smaller unaffiliated VOIP providers out of the market. The result would be a market in which the consumer has a very limited choice of VOIP providers -- only those affiliated with his or her broadband provider. While he or she could change broadband providers in order to change VOIP providers, the consumer is likely to have only a limited choice of alternate broadband providers and must bear the high switching costs of changing providers. Without Commission action, discriminatory practices by vertically integrated firms would quickly lead to the demise of the vibrantly competitive VOIP market that exists today.

3. The Commission Should Exercise Its Title I Authority to Preserve Competition by Prohibiting Discrimination by Broadband Access Providers

Given the imminent threat to competition in the VOIP market, the Commission must take steps now to preserve competition by prohibiting discriminatory practices by vertically integrated broadband/VOIP providers. In Nuvio's view, such action should be taken under the Commission's Title I authority.

At least one class of broadband Internet access service – cable modem service – has been held by the Commission to be a pure “information service”.⁴ The Commission has also tentatively concluded that other kinds of wireline broadband Internet access are “information services” only.⁵ Thus, for these types of providers, the only way in which the Commission could impose a nondiscrimination condition is under its Title I jurisdiction.

³ See, e.g., Dinesh C. Sharma, *Study: Cable Giants Flex VoIP Muscle*, CNET News.com (Aug. 3, 2004); *Qwest to Launch VoIP in December*, CNET News.com (Nov. 18, 2003); *SBC Elbows Into VoIP*, Boston.internet.com (Nov. 20, 2003); *Verizon Details Internet Phone Plans*, CNET News.com (Nov. 18, 2003).

⁴ See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd. 4798 (2002) (“*Cable Modem Ruling*”).

⁵ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, (Continued...)

There is ample Commission and court precedent for the proposition that the Commission has Title I authority to regulate “information services” (previously “enhanced services”).⁶ However, it has traditionally refrained from exercising such authority because the market for these services has generally been viewed as competitive.⁷ But where competition in information services is threatened, as is the case here, then the Commission is fully justified in exercising its Title I authority to prohibit anticompetitive practices.⁸

Even if broadband Internet access were to be classified as including both a “telecommunications service” and an “information service,”⁹ the Commission should nevertheless exercise its authority under Title I to prohibit discrimination against unaffiliated VOIP providers. The Commission should not rely solely on the nondiscrimination requirements in Title II of the Communications Act, because those obligations only prevent discrimination in

Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, at ¶17 (2002) (“*Wireline Broadband NPRM*”).

⁶ See Communications Act of 1934, as Amended, § 2(a), 47 U.S.C. 152(a) (“The provisions of this act shall apply to all interstate and foreign communication by wire or radio”) and § 4(i), 47 U.S.C. 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”); *Wireline Broadband NPRM*, at ¶ 39 (“In *Computer II*, the Commission . . . found that it possessed jurisdiction over enhanced services under Title I, even as it re-affirmed and bolstered its justification for not imposing common carrier obligations on enhanced service providers.”); *Cable Modem Ruling*, at ¶¶ 75-77 (summarizing scope of Title I authority over information services and instances in which it has been invoked).

⁷ *Wireline Broadband NPRM* at ¶ 39 (“[The Commission] declined to exercise [Title I] jurisdiction and regulate enhanced services, however, because it found that market to exhibit ‘effective competition.’”) (citing *Computer II*, 77 FCC 2d 384, 432-33 ¶¶ 124-27 (1980)).

⁸ See *Wireline Broadband NPRM* at ¶ 39 (“[The Commission] reserved the right to exercise its Title I jurisdiction and to intervene should problems involving enhanced services arise.”) (citing *Computer II*); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934*, 16 FCC Rcd. 6417, 6457 ¶ 98 (1999) (asserting Title I jurisdiction over information services, whether provided by carriers or non-carriers).

⁹ See *AT&T Corp. v. Portland*, 216 F.3d 871, 878 (9th Cir. 2000) (“To the extent that @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service”); *Brand X Internet Service v. FCC*, 345 F.3d 1120, (9th Cir. 2003) (confirming *AT&T v. Portland*’s conclusion that cable broadband service was not a ‘cable service’ but instead was part ‘telecommunications service’ and part ‘information service.’”), *pet. for cert. filed Aug. 27, 2003*.

the provision of the telecommunications service component.¹⁰ Without a Title I nondiscrimination requirement, a broadband provider could simply discriminate through its control of the information service components of broadband service, *e.g.*, by degrading the processing (as opposed to mere transport) of packets destined for nonaffiliated providers.

4. Conclusion

For the reasons stated above, Nuvio urges the Commission to introduce a nondiscrimination requirement under Title I of the Act on vertically integrated broadband access and VOIP providers as soon as possible. Such action is both timely and necessary to ensure a vibrant competitive market for VOIP service.

¹⁰ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶95 (1998) (“We believe that Congress, by distinguishing “telecommunications service” from “information service,” and by stating a policy goal of preventing the Internet from being fettered by state or federal regulation, endorsed this general approach [of] [l]imiting carrier regulation to those companies providing the underlying transport...”).